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THE CONSTITUTION AND JOB DISCRIMINATION

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"In almost every way that unemployment is measured and charted Negroes are among those who suffer the heaviest."[1] In 1962, one out of twenty whites were unemployed compared to one out of nine nonwhites (90 per cent of whom are Negroes). In the past five years the nonwhite unemployment rate has never been less than double the white rate. In every occupational group, from the common laborer to the highly trained professional, the nonwhite unemployment rate exceeds the white. That rate among nonwhite teenagers is "dangerously high:" 21% of all teenage boys and 28% of all teenage girls.[2] Given these grim statistics, it is not surprising that last August's march on Washington was for "jobs and freedom."

In part, of course, this situation is due to the fact that a higher proportion of nonwhites than whites are not trained for skilled or even semi-skilled employment. To that extent, the problem is a product of years of discrimination in other areas.[3] Some effort to meet this aspect of the matter is now being made through a variety of federal employment training and retraining programs. Negroes are participating in these federal programs in about the same proportion as they populate the ranks of the unemployed, although in some southern states they must attend segregated classes to do so. But seven out of ten Negroes hired through these programs are hired as common laborers.[4] Obviously, the results of a century of discrimination will not be eliminated overnight.

Apart from the question of employment qualifications, however, it is apparent that employment opportunities for Negroes and other minority groups are restricted also by discriminatory hiring and tenure practices. "The old adage that the Negroes are the last hired and the first fired" is still substantially accurate.[5] It is with this aspect of the problem that I am concerned.

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[1] *Report of the United States Commission on Civil Rights,* 73 (1963).

[2] *Id.* at 731.

[3] If further evidence is needed that there is no "natural " inferiority, we have it in the recently published report of a Committee of the American Association for the Advancement of Science. Boston Globe, November 3, 1963, 35.

[4] *Supra* note 1 at 74.

[5] *Report of the United States Commission on Civil Rights,* Vol. 3, p. 1 (1961).

I should perhaps state the assumptions from which my discussion proceeds. I view discrimination on the basis of race, color, national origin or creed as an intolerable practice and a mockery of our national aspirations whether it occurs in the field of employment or elsewhere. The continuation of such practices more than 100 years after the Emanicipation Proclamation seems to me a national disgrace whose elimination cannot longer await the general enlightenment of all parts of the nation. The full powers of government should be brought to bear against such discriminatory practices. And in my search for the most effective use to be made of governmental powers to that end the individual rights involved seem to me heavily to outweigh any argument for continued obeisance to "states rights"—particularly as the argument emanates from states dedicated to the denial of individual rights on grounds of race.

Neither do I proceed from the notion that the judiciary, unlike the other two branches of government, should exercise some extraordinary sort of self restraint in the discharge of its governmental functions.[6] Our courts have a law-making function which should be performed as conscientiously, but no more timidly, than the law-making function of other branches. It seems to me only remarkable, in a common law society which has also charged its courts to implement such sweeping constitutional mandates as due process clauses, that anyone should think otherwise.[7]

Finally, I find no help in, because I cannot understand, the recent plea for the application of "neutral principles" in constitutional adjudication.[8] The content of this neutrality concept remains intensely undefined,[9] but it seems to mean, as Judge Charles E. Clark has said, "that the principled decision is one which follows the beaten track rather closely, while a decision without precedent, breaking new ground, must be unprincipled,"[10] so that not only *Brown v. Board of Educ.*,[11] but also *Gibbons v. Ogden*[12] and *McCulloch v. Maryland*[13]

[6] See MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961).

[7] See Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1 (1963); Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961); Kalven, *Book Review*, 37 IND. L.J. 572 (1962); Alfange, *Book Review*, 72 YALE L.J. 1042 (1962).

[8] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[9] See Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571 (1960); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

[10] Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660, 664 (1960).

[11] 347 U.S. 483 (1954). [12] 9 Wheat. 1 (1824). [13] 4 Wheat. 315 (1819).

were not properly, neutrally principled. If this be the test for the principled decision, I agree with Judge Clark that we need more unprincipled ones.

With this disclosure of my own biases, I proceed to an examination of what has been done, and to an exploration of what can be done, to eliminate discriminatory employment practices.

PRESENT POLICIES

Very little has yet been done in this area by the Congress or the President. Discrimination in the classified civil service on the basis of "sex, marital status, race, creed or color" is forbidden by statute.[14] President Kennedy's Executive Order of March 6, 1961,[15] declares a policy against employment discrimination on grounds of race, creed, color or national origin anywhere in the executive branch and creates a President's Committee on Equal Employment Opportunity to supervise adherence to this policy. In addition, the Committee is empowered to enforce the same policy on all work performed under government contracts and, under an amendment of June 22, 1963,[16] on all construction contracts undertaken pursuant to any federal program involving governmental grants, loans, insurance or guarantees. Contractors who fail to comply with the policy may have their contracts terminated and may be declared ineligible for future contracts. But the Executive Orders do not reach to the vast federal programs of grants-in-aid to states and localities, which accounted for $7.5 billion in Federal expenditures in 1961,[17] and the various federal agencies which administer these programs pursue no consistent policy against discriminatory employment practices.[18]

More has been done in some twenty states and numerous cities where, following the New York example of 1945, statutes or ordinances forbid discrimination in employment and elsewhere and establish administrative agencies with procedures similar to those of the National Labor Relations Board to enforce the legislative policy. A careful study of the operations of such agencies made three years ago demonstrates that the most effective of them are those which have enforcement as well as conciliation powers and that, particularly in dealing with discriminatory empolyment practices, the agency needs the

[14] 5 U.S.C. Sec. 1074.
[15] Executive Order 10925, 26 Fed. Reg. 1977 (1961).
[16] Executive Order 11114, 28 Fed. Reg. 6485 (1963). The Committee's revised regulations are published in 28 Fed. Reg. 9812 (1963).
[17] *Supra* note 5 at 81.
[18] *Id.*, 84-91.

authority to act on its own initiative and to invoke some sort of interlocutory relief while cases are being processed.[19]

There can no longer be serious doubts about the constitutionality of such state and local legislative efforts. When New York forbade labor unions to discriminate in their membership policies or to discriminate against members on grounds of race, color or creed, an objecting union which sought to enshrine its Freedom to discriminate in the due process clause of the fourteenth amendment was told that its argument had "no constitutional basis."[20] And if the due process clause does not protect the employer's right to discriminate in hiring and firing on a ground so near to his pocketbook as union membership,[21] it is unlikley that it will be found to protect his right to discriminate on a ground so dear to his prejudices as race or color.

Decisions invalidating state laws which required[22] or forbade[23] segregation within the state of passengers on interstate carriers might have suggested that the commerce clause imposed some limitations on the states' power to prohibit discrimination in employment. But doubts on this score seem to be disposed of by last term's decision finding that Colorado could forbid racial discrimination by an interstate airline in the hiring of its pilots, since the "hiring within a State of an employee, even for an interstate job, [is] a much more localized matter than the transporting of passengers from State to State." Moreover, insofar as the passenger cases found the burden on commerce in the possibility of conflicting regulation, recent cases dealing with segregation in education[24] as well as segregation of passengers in interstate and intrastate transportation[25] were taken to establish that "any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[26]

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[19] *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961).

[20] Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945).

[21] Associated Press v. N.L.R.B., 301 U.S. 103 (1937); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936); Texas and NO.R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548 (1930).

[22] Morgan v. Virginia, 328 U.S. 373 (1946).

[23] Hall v. DeCuir, 95 U.S. 485 (1877). *Cf.* Bob-Lo Excursion Co. v. Michigan 333 U.S. 28 (1948).

[24] Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharp, 347 U.S. 497 (1954).

[25] Bailey v. Patterson, 369 U.S. 31 (1962).

[26] Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963)

The chief shortcoming of the states as a source of protection against discrimination in employment, then, does not lie in their want of power to act. It lies, rather, in the unwillingness of some of them to do so. It is apparent that relief will not come from those states where it is most needed.

The solution to the problem, if it is to come in our life-time, must come from an exercise of national powers. I turn, therefore, to an examination of what the federal constitution requires and what it authorizes Congress to require.

CONSTITUTIONAL REQUIREMENTS

We may begin where most of the litigation involving racial discrimination has begun, with the due process and equal protection clauses of the fourteenth amendment. Here, the beginnings go back at least to the *Civil Rights Cases*[27] construing these clauses as a limitation on state action only, so that the authority conferred upon Congress by the fourteenth amendment to enforce its provisions by "appropriate legislation" could not extend to a federal statute forbidding "simply a private wrong" consisting of the refusal of a carrier, an inn-keeper or a theater operator to serve Negroes. Nothing was decided in those cases about the power of Congress under the commerce clause, and that power has been successfully employed to forbid racial discrimination in service by interstate carriers[28] and by the operators of restaurants in the terminals of such carriers.[29] But the *Civil Rights Cases* stand for two substantial limitations on federal powers under the fourteenth amendment: (1) Congress may legislate only against state action denying due process of law or the equal protection of the laws; it may not act to "provide due process of law" or to "establish laws for ... equal protection." (2) Although the fourteenth amendment is to be enforced by the courts as well as the Congress, it can be invoked by the courts also only as against "state action."

But the Court in the *Civil Rights Cases* was clear that the fourteenth amendment would reach to "all state legislation, and state action of every kind," and the subsequent history of racial discrimination cases under that amendment has been largely devoted to identifying action to be characterized as state action. The full reach of this constitutional limitation upon action which is governmental rather than

[27] 109 U.S. 3 (1883). See also United States v. Harris, 106 U.S. 629 (1882) United States v. Cruikshank, 92 U.S. 542 (1875).
[28] Henderson v. United States, 340 U.S. 846 (1950).
[29] Boynton v. Virginia, 364 U.S. 454 (1960).

private is not to be found solely in cases dealing with the states and the fourteenth amendment, however. Instructive analogies are to be found in the cases under the fifteenth amendment, which forbids both the states and the United States to deny or abridge any citizen's rights to vote on account of race, color or previous condition of servitude. And further analogies are to be found under the due process clause of the fifth amendment, which forbids racial discrimination by the federal government, not only in its governance of the District of Columbia,[30] but also in its regulation of interstate commerce[31] and—as the fourth circuit has recently reminded us[32] in invalidating the segregation allowed by the "separate but equal" facilities clause in the Hill-Burton Act[33] for private hospitals constructed with federal aid—in its expenditure of federal funds.

The Texas Democratic primary cases began the exploration of the "state action" concept. Moving from the easy conclusion that a state statute excluding Negroes from a party primary violated the fourteenth amendment,[34] the Supreme Court found the vice not cured by repeal of that statute and the adoption of another which gave the authority to discriminate to the State Executive Committee of the party, whose members were found to act "as the delegates of the state."[35] After an original decision to the contrary,[36] the same conclusion was reached where the discrimination was practiced by the party convention and where the state by statute provided for the primary election in such a fashion that it could be said that the party convention acted as "an agency of the State."[37]

These cases may be said to establish no more than that action by one authorized by the state to act is state action even though the actor is given no official title. But cases decided under the old Civil Rights Acts applicable to those who act "under color of any law, statute, ordinance, regulation, or custom"[38] or "under color of any statute, ordinance, regulation, custom or usage,"[39] have pushed matters a bit further. In *United States v. Classic*,[40] state election officials who were charged under the federal act with acting "under color of state law"

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[30] Bolling v. Sharp, 347 U.S. 497 (1954).
[31] Steele v. Louisville & Nashville RR Co., 323 U.S. 192 (1944).
[32] New York Times, November 2, 1963, 12.
[33] 42 U.S.C. §291e(f).
[34] Nixon v. Herndon, 273 U.S. 536 (1927).
[35] Nixon v. Condon, 286 U.S. 73, 85 (1932).
[36] Grovey v. Townsend, 295 U.S. 45 (1935).
[37] Smith v. Allwright, 321 U.S. 649, 663 (1944).
[38] 18 U.S.C. §242. [39] 42 U.S.C. §1983. [40] 313 U.S. 299, 326 (1941).

in their failure to count the ballots of some voters in a state primary for the nomination of Congressional candidates got no comfort from the fact that the state statutes required an accurate count. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." The application of the statute in *Classic* was premised upon the right to choose federal Representatives as guaranteed by article I, sec. 2, which "is secured against the action of individuals as well as of states," so that only statutory construction and not the meaning of "state action" was involved.

But in *Screws v. United States*,[41] where application of the same statute to a sheriff charged with killing a prisoner was based upon the due process clause of the fourteenth amendment, defendant was told that, "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." And in *Monroe v. Pape*,[42] where application of the federal statute was again premised upon the due process clause of the fourteenth amendment, the Court reaffirmed that "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."

In both the Texas primary cases and the Civil Rights Acts cases, it might be said that, since the state had selected the particular organization or individual to perform the particular task out of which complaint arose, nothing more than a liberal application of *respondeat superior* was involved. But a considerably broader application of agency notions is involved in the labor union cases. Although thus far confiined to racial discrimination only as manifested in the negotiation of collective bargaining contracts[43] and the processing of grievances[44] by unions selected by a majority of employees and given exclusive representation authority by the Railway Labor Act or the Labor Management Relations Act, the potentialities are large. The fifth amendment's requirements are to be read into the federal statutes

[41] 325 U.S. 91, 111 (1945).

[42] 365 U.S. 167, 171-172 (1961). See also Williams v. United States, 341 U.S. 97, 98 (1951), where a private detective was found to be acting "under color of law" because he held a "special police officers card" issued by the city, "had taken an oath and qualified as a special police officer," and was accompanied by a regular police officer while he coerced confessions from the complaining witnesses.

[43] Syres v. Oil Workers Int'l Union, 350 U.S. 232 (1949); Steele v. Louisville and Nashville R. Co., 323 U.S. 192 (1944).

[44] Conley v. Gibson, 355 U.S. 41 (1957).

because the union "is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty to protect those rights."[45] Add only a contract for compulsory union membership, executed within the Congressionally conferred authority, and the union's use of its dues revenue may become subject to constitutional limitations.[46] By the same token, the expenditures of integrated bar associations may be subject to fourteenth amendment limitations.[47] It is no longer clear that the act of the state's agent is state action only if committed within the scope of his authority.

And if the state's grant of exclusive representational authority to a labor union is sufficient to convert the action of the union into state action, what of the state's certificate of convenience and necessity which confers upon a public utility an exclusive monopoly to provide goods or services? *Public Utilities Comm'n v. Pollak*[48] found that Congress, by granting a franchise to a privately owned transit company which conferred a "substantial monopoly" in the District of Columbia, and a federal regulatory commission, by refusing to forbid radio broadcasting in its passenger vehicles, had "sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments ... applicable." Is the fourteenth amendment any less applicable under state franchise? *Bowman v. Birmingham Transp. Co.*,[49] concluded that it was not, and found the amendment violated when a transit company franchised by the city segregated its passengers. And how different are those operating under state-granted licenses, such as liquor licenses, which are issued in limited numbers?

From the franchise or license which confers a complete or partial monopoly, the pursuit of state action may turn to those who operate enterprises under state or local license or permit issued to all who can qualify. Here at least, it is said, matters are different. Such licenses or permits are merely devices for collecting taxes, or implementing safety or sanitary regulations, or imposing standards for the technical qualifications of those operating the enterprise.[50]

[45] Steele v. Louisville & Nashville Railroad Co., *supra* note 43 at 198.
[46] International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).
[47] See Lathrop v. Donahue, 367 U.S. 820 (1961).
[48] 343 U.S. 451, 461 (1952).
[49] 280 F.2d 531 (5th Cir. 1960).
[50] Statement of Paul Freund, Hearings before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., 1183, 1188 (1961); Karst & Van Alstyne, *Sit-Ins*

Perhaps the distinction is valid if the confines of state action are to be found in doctrines of agency. But reliance upon agency doctrine has already been marked by three important exceptions.

One exception is to found in *Burton v. Wilmington Parking Authority*,[51] finding discriminatory state action where a privately operated restaurant in premises leased from a state parking authority refused to serve Negroes. There was no indication that the state leased the premises to a restaurant operator because a restaurant was desired in conjunction with the parking facilities. Indeed, there was evidence that the state would not have leased the premises at all had it not been deemed advisable in order to insure coverage of the costs of constructing and operating the parking facilities. But the state did benefit from the rentals received and from the parking needs of restaurant patrons and the restaurant benefited from the convenience of parking facilities and possibly from tax exemption. This was held enough to indicate "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.... The State has so far insinuated itself into a position of interdependence with [the restaurant operator] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." It is difficult to imagine how any governmental leasing of property could be viewed as significantly different, and analogies can be drawn to other forms of governmental economic aid such as subsidies and special tax advantages. And, as previously indicated,[52] the fourth circuit has found both the federal and state governments under the federal grants-in-aid program for hospital construction "so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments."

Perhaps *Burton* merely adds the concept of joint venture to the orthodox doctrines of agency. The same cannot be said for the remaining two exceptions.

Marsh v. Alabama[53] cuts across both of them. Invalidating under the first and fourteenth amendments the application of a state trespass statute to those who distributed religious literature in a company-

and State Action—Mr. Justice Douglas Concurring, 14 STAN. L. REV. 762, 774-775 (1962); Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959).

[51] 365 U.S. 715, 724-725 (1961).

[52] *Supra* note 32.

[53] 326 U.S. 501, 506 (1946).

owned town in violation of company rules, the Court rejected the argument that "the corporation's right to control the inhabitants of [the town] is coextensive with the right of the homeowner to regulate the conduct of his guests."

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.... Thus the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. . . .
>
> The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.[54]

Here are two distinct ideas: (1) Property devoted to public use may be regulated to protect individual rights guaranteed by the Constitution against state action. (2) The invocation of state sanctions to vindicate private discrimination constitutes state action in violation of those guarantees.

The second idea, of course, was pursued in cases finding a violation of the fourteenth amendment where state courts are employed specifically to enforce[55] or to grant damages for breach of[56] racially restrictive covenants. Its application to instances of the use of state courts and state trespass or breach of the peace laws to vindicate discrimination in service in places of public accommodation has thus far been avoided in the "sit in" cases by resort to due process prohibitions against convictions devoid of evidentiary support or convictions for crimes not charged,[57] or by finding that the decision to discriminate was made by the state rather than, or as well as by, the owner of the public accomodation.[58] But this application of the fourteenth amendment is being urged again in "sit in" cases argued before the Supreme Court this term.

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[54] *Id.*, at 506, 508.
[55] Shelley v. Kraemer, 334 U.S. 1 (1948).
[56] Barrows v. Jackson, 346 U.S. 249 (1953).
[57] Garner v. Louisiana, 368 U.S. 157 (1961).
[58] Wright v. Georgia, 373 U.S. 284 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963).

Of more interest here is the first idea expressed in *Marsh v. Alabama,* that property devoted to a public use may be regulated to protect fourteenth amendment rights. When combined with the notion that state inaction may also violate consitutional guarantees, it opens broad new vistas. For in the *Pollak* case the Court was clear that the application of the first and fifth amendments did not depend upon the franchise granted to the transit company by Congress:

> [W]e do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly... in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.[59]

In other words, constitutional guarantees against governmental action became applicable solely because of government's failure to act on a matter within its authority. In the *Pollak* case the Commission's authority to act may have been particularly clear because the transit company was a "public utility." But the District of Columbia's regulatory powers are not confiined to public utilities. It also has the power to forbid racial discrimination in the services of a privately-owned restaurant in the District. And, as Mr. Justice Douglas explained for the Court, it has the power because Congress could and did confer upon the District "all the powers of legislation which may be exercised by a state in dealing with its affairs." The District has authority "as broad as the police power of a state so as to include a law prohibiting discriminations against Negroes by the owners and managers of restaurants."[60]

If the failure of the District of Columbia to exercise its police power over a public utility may constitute government action within the meaning of constitutional guarantees, why is not the failure of the

[59] *Supra* note 48 at 462.

[60] District of Columbia v. John R. Thompson Co., Inc., 346 U.S. 100, 108, 110 (1953). In Burton v. Wilmington Parking Authority, *supra* note 51, the Court also noted that the Authority by its lease could have forbidden the lessee to discriminate and concluded that, "By its inaction, the Authority... has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. at 725.

District—or of a state—to exercise its police power over restaurants or other subjects of police power regulation also state action?

Terry v. Adams,[61] the latest of the Texas primary cases, strongly suggests that it is. The primary election conducted by the Jaybird Party in advance of the primary provided for by state law, but the "only election that has counted in this Texas county for more than fifty years," was held to constitute state action in violation of the fifteenth amendment because the Jaybird Party excluded Negroes from membership. It made no difference that "the state does not control that part of this elective process which it leaves for the Jaybirds to manage." "It violates the Fifteenth Amendment," as three Justices put it, "for a state, by such circumvention, to permit . . . the use of any device that produces an equivalent of the prohibited election." Or, as four other Justices expressed it, "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." In other words, the state violates the fifteenth amendment by doing nothing at all—by failing to act in a situation where it had power to act and where the result of its inaction is to permit racial discrimination which it could not authorize. As Professor Williams has pointed out,[62] the same concept of state inaction as a violation of the fourteenth amendment is implicit in *Baker v. Carr*,[63] holding that state failure to reapportion legislative districts to take account of population shifts may amount to a denial of equal protection.

Indeed, it seems inevitable that state inaction must be weighed in the balance under constitutional provisions which forbid the state to "deprive" any person of life, liberty, or property without due process of law, or to "deny" any person the equal protection of the laws. In a variety of circumstances the deprivation or the denial of protection may come precisely because the state fails to act. In such circumstances, as Walter Gellhorn has said, "when the state does not intervene . . . , it is making a choice just as surely as when it does intervene."[64]

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[61] 345 U.S. 461, 469, 484 (1953).
[62] Williams, *The Twilight of State Action*, 41 TEX. 347, 364 (1963).
[63] 369 U.S. 186 (1962).
[64] GELLHORN, AMERICAN RIGHTS, 172 (1960). *Cf.* Horowitz, *The Misleading Search for "State Action" under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208, 216-19 (1957).

If the state may violate the fourteenth amendment by its failure to prohibit—or, as it was in *Terry v. Adams,* by permitting—private discriminatory action which it has authority to forbid, the thrust of the argument in two of Mr. Justice Douglas' recent concurring opinions in the "sit in" cases involving privately owned restaurants becomes more apparent. In *Garner v. Louisiana,*[65] after noting that the majority opinion in the *Civil Rights Cases* referred to "state authority in the shape of laws, *customs* or judicial or executive proceedings,"[66] he traced the evolution of state power to regulate business activity, from the "public utility" cases, through the expanding list of businesses "affected with a public interest" to *Nebbia v. New York,*[67] which was taken to establish that, "A business may have a 'public interest' even though it is not a 'public utility' in the accepted sense, even though it enjoys no franchise from the State, and even though it enjoys no monopoly." From this he concluded:

> Those who own retail establishments under permit from a municipality operate a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility.
>
> [T]here can be no difference . . . between one kind of business that is regulated in the public interest and another kind so far as the problem of racial segregation is concerned. . . . The authority to license a business for public use is derived from the public. Negroes are as much a part of the public as are whites. A municipality granting a license to operate a business for the public represents Negroes as well as other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public. . . .[68]

In *Lombard v. Louisiana,*[69] he invoked the dissenting views of the first Mr. Justice Harlan in the *Civil Rights Cases:*

> In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the state, because they are charged with duties to the public and are amenable, in respect of their duties and functions, to governmental regulation. . . . [A] denial, by these instrumentalities of the state, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the state, within the meaning

[65] *Supra* note 57.
[66] 109 U.S. 3, 17 (1883).
[67] 291 U.S. 502 (1934).
[68] 368 U.S. 182-183, 184.
[69] *Supra* note 58.

of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the states."[70]

That conclusion seemed to Mr. Justice Douglas to follow also from what had been decided later:

> The nexus between the state and the private enterprise may be control, as in the case of a state agency, or the nexus may be one of numerous other devices.... A state-assisted enterprise serving the public does not escape its constitutional duty to serve all customers irrespective of race, even though its actual operation is in the hands of a lessee. *Burton v. Wilmington Parking Authority*.... State licensing and surveillance of a business serving the public also brings its service into the public domain. This restaurant needs a permit from Louisiana to operate; and during the existence of the license the State has broad powers of visitation and control. This restaurant is thus an instrumentality of the state since the State charges it with duties to the public and supervises its performance. The State's interest in and activity with regard to its restaurants extends far beyond any mere income-producing licensing requirement.[71]

Recent criticism of this position seems to miss the mark in equating the public "license" to which Mr. Justice Douglas refers to the "permit" which the state or city had actually issued and in ignoring the precedent for treating state inaction as violating the fourteenth amendment.[72] It may be true that state assistance to enterprise, as in *Burton v. Wilmington Parking Authority*, may provide some basis for state regulation of racial practices, and that a state-conferred monopoly may provide a similar basis for similar regulation of public utilities.[73] But it is equally true that the state's power to regulate the racial practices of such public accommodations as restaurants is as firmly established without special public assistance or monopoly franchise.[74] The only significance of a formally issued "permit" conditioned on payment of taxes or compliance with health or safety requirements is to indicate that the business is one subject to taxation or regulation in other ways also in the public interest. But the fourteenth amendment question should not be affected by the fact that the state issues neither permits nor licenses for the business—a point

[70] 109 U.S. 3 at 58-59 (1883).
[71] 373 U.S. at 282-283.
[72] Karst & Van Alstyne, *Sit-Ins and State Action—Mr. Justice Douglas Concurring*, 14 STAN. L. REV. 762, 774-75 (1962).
[73] *Id.* at 774-75.
[74] *Supra* note 60.

of more than rhetorical moment in view of the 1959 action of Prince Edward County, Virginia, in closing its public schools, and of the Tennessee statute abrogating the innkeeper's common law duty to serve all.[75]

The state's power to prohibit racial discrimination with respect to any particular enterprise being established, the only remaining constitutional question is whether its failure to exercise that power should be viewed as violating the fourteenth amendment. If *Public Utilities Comm'n v. Pollak*[76] and *Terry v. Adams*[77] be construed, as they might be, to require knowing acquiescence in private discrimination rather than mere inaction by the state, then the existence of an established discriminatory custom would be relevant to the application of the fourteenth amendment.

At the present moment no one can with confidence undertake to define the outer limits of the "state action" (or state inaction) concept. But, so far as questions of racial discrimination in violation of the fourteenth amendment are concerned, the following propositions seem to me defensible:

(1) The states can anticipate little success with subterfuges designed to cloak discriminatory state action as private action. As the fifteenth amendment "nullifies sophisticated as well as simple-minded modes of discrimination,"[78] so does the fourteenth nullify sophisticated as well as simple-minded camouflages of state action.[79]

(2) Quite apart from questions of collusion or subterfuge, those who are vested by the state with authority to regulate the affairs of others will be forbidden to exercise their authority, and perhaps to exercise other powers over their constituents, in a discriminatory fashion.

(3) Those who operate enterprises on state-owned property will be forbidden to discriminate, and the same rule will probably be applied to those who receive other forms of economic assistance from the state.

(4) There is good reason to expect that any enterprise subject to

[75] See Turner v. City of Memphis, 369 U.S. 350 (1962).
[76] *Supra* note 48.
[77] *Supra* note 61.
[78] Lane v. Wilson, 307 U.S. 268 (1939).
[79] "State support of segregated schools through any arrangement, management funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." Cooper v. Aaron, 358 U.S. 1, 19 (1958).

the state's power to forbid discrimination will be required to operate in a non-discriminatory manner.

Except for labor union cases, none of the decisions upon which these conclusions are based dealt with the employment relation in any way. But I believe that all of the conclusions are applicable to discriminatory employment practices because, since the decision in *Brown v. Board of Educ.*,[80] the Supreme Court has treated all forms of racial discrimination as fungible under the fourteenth amendment. That decision has been treated as justifying summary disapproval of racial segregation or exclusion in state recreation facilities,[81] that decision and the decisions on recreational facilities have been treated as conclusive on the unconstitutionality of segregation in transportation,[82] and the transportation decisions are added to the list of authorities justifying summary invalidation of segregation in restaurants.[83] Finally, as I have previously indicated,[84] the education and transportation decisions are taken to establish that "any state or federal law requiring applicants for any job to be turned away because of their color" would be invalid under the fifth and fourteenth amendments.

It seems to me clear, therefore, that the reach of constitutional guarantee against racial discrimination is as great in the area of employment as in any other. But it seems equally clear that judicial enforcement of these guarantees through injunction and possibly by way of defenses to litigation designed to implement discriminatory practices, is a particularly poor way to enforce the right to equal treatment in employment.[85] What is needed is a federal statute creating an administrative agency with enforcement powers similar to those of the NLRB, with power to act on its own initiative, and with power to grant interim relief. I turn, therefore, to a brief inquiry into the possible reach of such a federal statute.

The Power of Congress

Congress clearly has the power to legislate against discrimination

[80] *Supra* note 24.

[81] New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958); Holmes v. City, 350 U.S. 879 (1958); Baltimore v. Dawson, 350 U.S. 877 (1955). See also Watson v. City, 373 U.S. 526 (1963).

[82] Gayle v. Browder, 352 U.S. 903 (1956); Bailey v. Patterson, 369 U.S. 31 (1962).

[83] Turner v. City, *supra* note 75.

[84] See text at notes 24-26, *supra*.

[85] For some of the difficulties in framing injuctive relief to vindicate voting rights under the Civil Rights Act of 1957, see United States v. Beaty, 288 F.2d 653 (6th Cir. 1961).

in employment by any means which can be characterized as "state action." And if I am right in my conclusion that state inaction against private discrimination may constitute a violation of the fourteenth amendment, then Congress may legislate against state inaction also under the power conferred upon it by section 5 of that amendment "to enforce, by appropriate legislation, the provisions of this article." In other words, the notion that state inaction may violate the fourteenth Amendment has undermined the view expressed in the *Civil Rights Cases* that Congress may not "provide due process of law" nor "establish laws for . . . equal protection."[86] In any event, a strong argument can be made that, at least with respect to the equal protection clause, that view was contrary to the "original understanding" of the fourteenth amendment.[87]

This is not to say, of course, that Congress could or should undertake to define the situations to which the federal statute should apply. Rather, it should employ the technique used with respect to voting rights in the Civil Rights Act of 1957,[88] by legislating generally against discriminatory employment practices by anyone. The question of the constitutionality of any particular application can then be left to be determined in the course of the law's administration as *United States v. Raines*[89] has authorized for the 1957 Act. But the due process and equal protection clauses of the fourteenth amendment, as well as the due process clause of the fifth amendment, should be specifically denominated as some of the sources of constitutional power which Congress has invoked.

It also seems apparent, as the Administration has urged in connection with its proposed public accommodations bill,[90] that Congress should in addition invoke the commerce power. Certainly a power that is adequate to support legislation against such diverse subjects as lottery tickets,[91] impure and misbranded food and drugs,[92] pros-

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[86] 109 U.S. at 13.

[87] See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

[88] 42 U.S.C. §1971.

[89] 363 U.S. 17 (196). See also United States v. McElveen, 177 F. Supp. 355 (E.D. La., 1959), aff'd 362 U.S. 58 (1960).

[90] See statement of the Department of Justice, Civil Rights-Public Accommodations Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., 1295-1299 (1963).

[91] Champion v. Ames, 188 U.S. 321 (1903).

[92] United States v. Sullivan, 332 U.S. 689 (1948); McDermott v. Wisconsin, 228 U.S. 115 (1913).

titutes,[93] stolen automobiles, [94] child labor,[95] price discrimination,[96] and unfair methods of competition, [97] and which may be exercised to fix maximum hours and minimum wages[98] and to forbid discrimination in employment on grounds of union membership or activity,[99] may be exercised also to forbid discrimination in employment on grounds of race.

Obviously the commerce power will reach many situations which the Congressional power under the fourteenth amendment will not reach. But, though the commerce power is wondrously broad, particularly since *Wickard v. Filburn*,[100] it may fail to reach some areas which the fourteenth amendment will cover. Under certain circumstances, for instance, the fourteenth amendment might apply to Mrs. Murphy's boarding house, about which certain Senators were concerned during the hearings on the public accommodations bill.

And it seems to me that a federal prohibition against racial discrimination in employment should reach Mrs. Murphy's boarding house. It has been suggested that the application of a law forbidding discrimination in employment must be "balanced" against a freedom to discriminate which is also protected by the due process clause, and that the latter freedom may be found to weigh heaviest when personal association between employer and employee is close.[101] But when a labor union made a similar due process argument against a state statute forbidding racial discrimination in its membership it was told, in *Railway Mail Ass'n v. Corsi*,[102] that to conclude "that such legislation violated the fourteenth amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." And the most assiduous balancer of them all added that such a claim was "devoid of constitutional substance" since to "use the Fourteenth Amendment as a sword against state power would stultify

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[93] Hoke v. United States, 227 U.S. 308 (1913).
[94] Brooks v. United States, 267 U.S. 432 (1925).
[95] United States v. Darby, 312 U.S. 100 (1941).
[96] 15 U.S.C. §13.
[97] F.T.C. v. R. F. Keppel & Bros., Inc., 291 U.S. 304 (1934).
[98] Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942).
[99] *Supra* note 21.
[100] 317 U.S. 111 (1942).
[101] Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 36-44 (1961). See also WILLIAMS, *op. cit. supra* note 62 at 369-73.
[102] 326 U.S. 88, 93-94 (1945).

that Amendment."[103] True, Mrs. Murphy is not a labor union, but it would be a rather remarkable turnabout of history to find in the due process clause protection for a private interest in excluding Negroes from employment as domestics.

Even though Congress invokes its full legislative powers under the due process, equal protection and commerce clauses, there will be ragged edges on the coverage of the statute and areas which are not covered. And administration of the statute would be hindered with litigation about coverage. These difficulties would be eliminated if a Court which has already adopted the dissenting views of the first Mr. Justice Harlan on the invalidity of the "separate but equal" notion under the fourteenth amendment[104] were also to accept his dissenting views in the *Civil Rights Cases* on the meaning of the thirteenth. The latter amendment, outlawing "slavery" and "involuntary servitude" and carrying its own authorization to Congress "to enforce this article by appropriate legislation," is not limited, as are the due process and equal protection clauses of the fourteenth amendment, to state action. It runs, and the legislative authority conferred by it on Congress runs also, to completely private action. As was said in applying the anti-peonage provisions of the federal criminal code to private parties, the thirteenth amendment "denounces a status or condition, irrespective of the manner or authority by which it is created."[105] The only problem lies in the definition of the "status or condition." The first Mr. Justice Harlan would have defined it broadly:

> That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable.... [U]nder the Thirteenth Amendment, Congress has to do with slavery and its incidents; and... legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon acts of individuals, whether sanctioned by state legislation or not.... I do not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery...

[103] *Id.*, Mr. Justice Frankfurter *concurring* at 98.
[104] Plessy v. Ferguson, 163 U.S. 537 (1896).
[105] Clyatt v. United States, 197 U.S. 207, 216 (1905).

> was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to free men of other races. Congress, therefore.... may enact laws to protect that people against the deprivation, *because of their race,* of any civil rights granted to other free men, in the same State....[106]

When the Court later concluded that the thirteenth amendment did not authorize a federal statute which would penalize private action designed to compel Negroes to abandon their employment, Mr. Justice Harlan was joined by Mr. Justice Day in protesting that the statute did no more than to prohibit action "to subject anyone to the badges or incidents of slavery."[107]

I am pleased to note that Mr. Justice Harlan's views now command the adherence of Dean Erwin Griswold, who has been urging them before Congressional Committees,[108] and that the Department of Justice has also taken cognizance of them.[109] It seems to me that a federal statute forbidding racial discrimination in employment should also invoke the legislative powers conferred by the thirteenth amendment so that the way will be open to ask the Supreme Court to reconsider the question.

Another avenue to the coverage of much of the discrimination not within the reach of the due process and equal protection clauses of the fourteenth amendment or of the commerce clause may be found in another provision in the fourteenth amendment. Not all of the provisions of that amendment are cast as restraints on state action. In particular, the first sentence of section 1 provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This provision, like the thirteenth amendment, deals with a status or condition. And the legislative authority conferred on Congress by section 5 of the amendment to "enforce... the provisions of this article" reaches as well to this provision as to any other. Why should not a federal statute forbidding racial discrimination in em-

[106] 109 U.S. at 35-6.
[107] Hodges v. United States, 203 U.S. 1, 35 (1906).
[108] Literacy Tests and Voter Requirements in Federal... State Elections—Hearings before Subcommittee on Constitutional Rights of Senate Committee on Judiciary on S. 480, S. 2750 and S. 2929. 87th Cong., 2d Sess., 134-35, 138 (1962); Civil Rights-Public Accommodations Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., 776, 787 (1963).
[109] *Ibid.,* 1302-1303.

ployment define the right to be free from such discrimination, public or private, as a right of national citizenship? And if it did, would it not be difficult for the Supreme Court to declare either that Congress had no right to define the ingredients of national citizenship or that it had erred in including this fundamental civil right in the definition?

There is, of course, a logical answer to this argument. The provision I have quoted is immediately followed by the provision that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Ergo,* it can hardly have been intended to guarantee rights of United States citizenship against state or private action in the first sentence of the amendment, since that would render the strictures against state abridgment in the second sentence mere surplusage. The conclusion must be that the first sentence, while it confers citizenship, does not authorize Congress or the Court to define the rights of citizenship.

This is a good logical argument. It is as logical as the argument that the due process clause of the fourteenth amendment cannot incorporate any of the specific guarantees of the Bill of Rights because the Bill of Rights also contains a due process clause. It may meet with no more success than that argument did. It seems to me, therefore, that any federal statute should define the right to be free from racial discrimination in employment as an ingredient of the national citizenship conferred by the fourteenth amendment.[110]

I have previously suggested that the federal statute should also invoke the fifth amendment as a source of constitutional authority. Such invocation would be entirely appropriate if for no other reason than that the statutory command would be in part addressed to those whose action would be characterized as federal action subject to the due process clause of that amendment. But I must confess, finally, that it appeals to me for an entirely separate reason as I contemplate the limitations which have been found in the fact that the fourteenth amendment provides that "no state" shall deny due process or equal protection.

As Alexander Pekelis has pointed out,[111] the fifth amendment reads in pertinent part "nor shall *any person* . . . be deprived of life, liberty, or property, without due process of law." It is not by its terms limited to a restraint on governmental action. It may be clear enough

[110] The idea has already occurred to Senator Prouty. Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., 791 (1963).

[111] PEKELIS, LAW AND SOCIAL ACTION, 108-113 (1950).

as an historical matter that the fifth amendment was not intended as a limitation on the states. It is probably equally clear that the "original understanding" took no account of, because it could not anticipate, the latter-day development of "the capacity of private power-aggregates to limit the very freedoms the Constitution has attempted to protect."[112] That being true, the "original understanding" need not be given conclusive effect and the due process clause of the fifth amendment could be applied to private action. It is still a Constitution we are expounding, and it was ordained and established to "secure the Blessings of Liberty to ourselves and our Posterity."

ADDENDUM

With respect to the text accompanying footnote 3, *supra,* the Department of Labor has recently promulgated regulations designed to eliminate racial discrimination in training programs administered by it. 28 Fed. Reg. 13775 (1963).

[112] GELLHORN, *op. cit supra* note 64 at 163.